In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-947

MICHAEL JOHN KNIGHT AND DAVID STRONGOSKY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the district court erred in refusing to suppress evidence obtained as a result of separate stops of automobiles in which they were riding.

After a jury trial in the United States District Court for the Northern District of Florida, petitioners and five others[1] were convicted of possession of 18,000 pounds of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a), and of conspiracy to distribute that marijuana, in violation of 21 U.S.C. 846.[2] Each was sentenced to consecutive terms of five years' imprisonment on each count. The court of appeals affirmed (Pet. App. A; 501 F.2d 208).

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[1]Petitioners' co-defendants were James G. Maslanka, Walter Richard Ercius, Steven Garrett Lamb, Barry Wesley Korn and Floyd Farrell Capo.

[2]Petitioners were also convicted of conspiracy to import and importation of the marijuana, in violation of 21 U.S.C. 963 and 952(a). However, the court of appeals reversed the importation counts, finding the evidence regarding the method of importation insufficient (Pet. App. 23-24).

The evidence established that on March 5, 1973, at about 6:00 p.m., Florida narcotics agents were investigating the discovery by fishermen of a large cache of marijuana at a desolate spot along Rocky Creek, a navigable inlet of the Gulf of Mexico, across from Buckeye Landing in a remote area about 100 miles north of Tampa, Florida (Pet. App. 11; Tr. 128-129).[3] Shortly after making a field test which indicated that the substance was indeed marijuana, one of the agents observed a blue Cadillac across Rocky Creek driving toward the landing along a rarely used one-lane dirt road (Tr. 54, 129, 136). As the Cadillac reached a spot on the dirt road from which the driver could see the unmarked police car at the landing, the Cadillac immediately turned around and headed toward the main road (Tr. 66). The agent then shouted to another agent to follow "the blue car" (Tr. 48-49, 71).

The second agent immediately got into the police car and proceeded along the dirt road. When he reached the intersection with the main road, the only vehicle in sight was a rapidly accelerating blue car about a half-mile north on the main road (Tr. 49, 103, 135). The agent placed a revolving blue light on his dashboard and chased the car, all the while flashing his headlights and blowing his horn (Tr. 105, 111, 123, 133). The agent chased the blue car for about five miles, at speeds reaching 105 miles an hour, until finally it pulled over to the side of the road. The agent then approached the car with his gun drawn and instructed the passengers to remain inside; he ordered the driver (co-defendant Maslanka) out of the vehicle and arrested him for exceeding the speed limit and fleeing a police officer (Tr. 49-50, 86, 108, 111, 131).

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[3]"Tr." refers to the transcript of the suppression hearing held on October 1, 1973.

As the agent was "patting down" the driver, he noticed a strong odor of marijuana about the driver's person and coming from the vehicle. After ordering the two passengers (petitioner Knight and co-defendant Ercius) out of the car, the agent noticed that the passengers also smelled of marijuana (Tr. 50-51). The three occupants of the blue Cadillac, including petitioner Knight, were then arrested for possession of the marijuana at Rocky Creek (Tr. 51). A search of Knight revealed a marijuana cigarette, cigarette papers, and a piece of paper covered with mathematical additions appearing to be some sort of tally (Tr. 52-53). Later investigation revealed a barge half full of marijuana near the site of the cache; Knight's fingerprints were found on the barge (Pet. App. 14).

As the agent who had stopped the blue Cadillac was returning along the dirt road to the scene of the cache, he overtook and stopped a blue pick-up truck with out-of-state license plates, about 500 to 600 yards from the landing, heading in the direction of Rocky Creek (Tr. 54, 93-94, 95).[4] The driver of the truck identified himself as Floyd Capo. Another agent, who had arrived on the scene just as the truck was stopped, had previously received information that a large amount of suspected marijuana had been seen on a barge owned by a Floyd Capo (Tr. 54-57). Capo and his passengers (petitioner Strongosky and co-defendants Korn and Lamb) were thereupon asked to alight from the truck and were given *Miranda* warnings (Tr. 97, 98). One of the agents noticed the odor of marijuana coming from some of the occupants of the truck, and he also observed that their clothing looked as if they had been rolling around in hay (Tr. 153-154). Capo told the agent that his passengers had located his barge, which had been lost, and that they were taking him to the barge so he could reclaim it (Tr. 132).

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[4]Contrary to petitioners' assertion (Pet. 6), the agent did not have his gun drawn when he approached the truck (Tr. 121).

The four occupants of the truck were then arrested. Petitioner Strongosky's clothing was later seized and chemically analyzed and was found to contain particles of marijuana along with bits of jute fiber, similar to that used in the sacks containing the marijuana. It was also established that the barge did belong to the driver of the truck and that one of Strongosky's fellow passengers had also left a fingerprint on the barge (Pet. App. 14-15).

1. Petitioner Knight contends that the evidence obtained as a result of the stop of the blue Cadillac should have been suppressed. This claim was rejected by the court of appeals in an opinion upon which we rely (Pet. App. 16-17):

> The marijuana was hidden in a remote area of a rural county. This area was approached by a narrow dead-end road. A car came down the road but, upon observing an unmarked car at the landing, turned back, apparently in flight, toward the highway. Certainly these facts provided reason for Agent Mortonson to investigate. Mortonson reached Route 361 and observed the car rapidly moving toward the north. His pursuit lasted for five miles at speeds around 100 miles per hour. First, Agent Mortonson arrested the driver for speeding, and then noticed the pervading smell of marijuana about Maslanka's person as well as the passengers [footnote omitted].

The court therefore concluded that the officers "would have been derelict in carrying out their appointed duties" had they failed to investigate further in these circumstances (Pet. App. 17, quoting *United States* v. *Allen*, 472 F.2d 145, 147 (C.A. 5)). The court also held (Pet. App. 16, n. 10) that it was reasonable for the officer to have approached the vehicle with his weapon drawn, since the circumstances suggested that the officer was in danger in

making this reasonable investigatory stop.[5] Quite apart from the legality of the investigatory stop of the vehicle, the court also held (*ibid.*) that the agent had probable cause to arrest co-defendant Maslanka, the driver, for speeding. The arrest of petitioner Knight was the natural result of the arrest of the driver, since the agent noticed the smell of marijuana coming from the vehicle while he was "patting down" the driver, thus giving him probable cause to arrest all the occupants of the vehicle.

2. Petitioner Strongosky contends that the evidence obtained as a result of the stop of the blue pick-up truck and the subsequent seizure and analysis of his clothing should have been suppressed. These contentions were also properly rejected in the opinion of the court of appeals (Pet. App. 18-20), upon which we rely.

Regarding the stop of the truck, the court stated (Pet. App. 18):

> * * * [I]t is obvious that the agents, in stopping the blue pick-up truck with the out-of-state plates, were acting within their authority to make an investigatory stop. The road to Rocky Creek was not well frequented, and the last car that had come down it had held three persons who were covered with marijuana. The agents merely stopped the truck and, having given the occupants their *Miranda* warnings, asked them where they were going. At that point the fact that three of the four smelled of marijuana supplied a probable cause for their arrest.

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[5]The court distinguished *United States* v. *Strickler*, 490 F.2d 378 (C.A. 9), cited by petitioners (Pet. 5), on the grounds that here the officer was alone on a lonely highway, stopping a car containing three young males who had just led him on a five-mile chase at high rates of speed. In *Strickler*, the officer stopped the suspects' vehicle on a city street, and he was assisted by two other police vehicles that had surrounded the suspects' car. *Id.* at 379.

Moreover, at the time the occupants of the truck were arrested, one of the agents had information that the driver of the truck (co-defendant Capo) was also the owner of a barge containing marijuana.

Regarding the seizure of petitioner Strongosky's marijuana-laden clothing some twelve hours after he was arrested and while he was in jail, the court of appeals properly found the delay to have been reasonable in light of the ongoing investigation and recovery of the large bulk of marijuana. Accordingly, it held that the warrantless seizure was permissible under this Court's decision in *United States* v. *Edwards*, 415 U.S. 800, 806-809. See also *United States* v. *DeLeo*, 422 F.2d 487, 493 (C.A. 1); *United States* v. *Williams*, 416 F.2d 4, 8 (C.A. 5); *United States* v. *Caruso*, 358 F.2d 184 (C.A. 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.